Dato' Raja Ideris bin Raja Ahmad & Ors v Teng Chang Khim (Chairman of the select Committee on Competence, Accountability and Transparency and the chairman of the Committee of Rights and Privileges State Legislative Assembly of Selangor) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-01(IM)-255 OF 2011
LOW HOP BING, ABDUL MALIK ISHAK AND CLEMENT SKINNER JJCA
16 DECEMBER 2011

Civil Procedure — Originating summons — Striking out — Application to strike out originating summons('OS') — Order to strike out, appeal against — Whether OS disclosed no reasonable cause of action — Whether plain and obvious case to allow striking out — Whether OS concerning area of law that was in process of development should not be struck out — Whether OS that prayed for declaratory relief could be struck out on grounds that it disclosed no reasonable cause of action — Specific Relief Act 1950 s 41 — Rules of the High Court 1980 O 18 r 19 & O 15 r 16

Dato' Teng Chang Kim ('the first defendant'), the speaker of the State Legislative Assembly ('the SLA'), was at all material times the chairman of the SLA Select Committee on Competence, Accountability and Transparency ('SELCAT'), the eighth defendant, while the second to seventh defendants were the committee members of SELCAT. The plaintiffs, who were members of the SLA, filed an originating summons ('the OS') against the defendants for alleged breaches committed by the first to eighth defendants under the standing orders of the SLA. By way of the OS the plaintiffs sought various declarations. The defendants applied to strike out the OS under O 18 r 19 of the Rules of the High Court 1980 ('RHC'), on the grounds that it disclosed no reasonable cause of action. The High Court judge found that the OS disclosed no sustainable cause of action and accordingly held that this was a plain and obvious case for the court to allow the striking out order under O18 r 19 of the RHC. This was the plaintiffs' appeal against that order. The plaintiffs submitted that they had a reasonable cause of action and that the court should hear and determine the OS on its merits. The plaintiffs also submitted that in cases where the OS sought declarations there was no requirement to have a cause of action at all.

Held, allowing the appeal with no order as to costs:

(1) The four authorities relied upon by the defendants in support of their case clearly militated against them and were no assistance to them (see paras 15–20).

(2) The alleged breached referred to by the plaintiffs clearly disclosed a reasonable cause of action that required further ventilation by the parties on merits. The determination on such alleged breaches was eminently unsuitable for summary disposal under the striking out procedure. If the OS raised some questions to be decided by a judge, the mere fact that the case was weak and not likely to succeed, was no ground for striking out the OS. A court should not strike out a claim or an OS concerning an area of law which was in the process of development or evolution as in the instant appeal. Thus, it was held that in these circumstances the plaintiffs should not be summarily deprived of the opportunity to argue their case (see para 21).

(3) The substantive law that conferred jurisdiction on our courts to grant a declaratory judgment was to be found in s 41 of the Specific relief Act 1950 ('the Act'), which was supplemented by the procedural law contained in O 15 r 16 of the RHC. By virtue of s 41 of the Act and O 15 r 16 of the RHC, the court's jurisdiction to make a declaratory judgment was unlimited, subject only to its own discretion. Thus, the court had the power to grant a declaration irrespective of whether the application had a cause of action or not and even if a cause of action did not exist at the time of the filing of an application. As such, this court decided to reinstate the OS and remit it to the High Court to be heard and disposed of on its merits before another judge (see paras 26–30).

[Bahasa Malaysia summary

Dato' Teng Chang Kim (defendan pertama), Speaker Dewan Undangan Negeri ('DUN'), pada semua masa material merupakan Pengerusi DUN Jawatankuasa Pilihan Khas Mengenai Keupayaan, Kebertanggungjawaban dan Ketelusan ('SELCAT'), defendan kelapan, manakala defendan kedua hingga ketujuh merupakan ahli-ahli jawatankuasa SELCAT. Plaintif-plaintif, yang merupakan ahli-ahli DUN, memfailkan saman pemula ('SP') terhadap defendan-defendan untuk pelanggaran-pelanggaran yang didakwa dilakukan oleh defendan pertama hingga defendan kelapan di bawah perintah tetap DUN. Melalui SP, plaintif-plaintif menuntut pelbagai pengisytiharan. Defendan-defendan memohon untuk membatalkan SP di bawah A 18 k 19 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'), atas alasan bahawa kausa tindakan yang tidak munasabah didedahkan. Hakim Makhamah Tinggi mendapati bahawa SP mendedahkan kausa tindakan yang tidak dibenarkan dan oleh itu memutuskan bahawa ini merupakan kes yang ringkas dan jelas bagi mahkamah untuk membenarkan pembatalan menurut A 18 k 19 KMT. Ini merupakan rayuan plaintif-plaintif terhadap perintah tersebut. Plaintif-plaintif menghujah bahawa mereka mempunyai kausa tindakan yang munasabah dan bahawa mahkamah seharusnya mendengar dan menentukan SP berdasarkan merit-meritnya. Plaintif-plaintif juga menghujah bahawa

dalam kes-kes di mana SP menuntut pengisytiharan, tidak terdapat keperluan untuk mempunyai kausa tindakan sama sekali.

Diputuskan, membenarkan rayuan dengan tiada perintah untuk kos:

(1) Keempat-empat autoriti yang diharapkan oleh defendan-defendan untuk menyokong kes mereka jelas tidak berkesan terhadap mereka dan tidak membantu mereka (lihat perenggan 15–20).

(2) Pelanggaran seperti didakwa yang dirujuk oleh plaintif-plaintif jelas menyatakan kausa tindakan munasabah yang memerlukan penghuraian lanjut oleh pihak-pihak berdasarkan merit-merit. Penentuan pelanggaran-pelanggaran yang didakwa jelas tidak sesuai untuk pelupusan terus di bawah prosedur pembatalan. Sekiranya SP menimbulkan persoalan-persoalan yang perlu diputuskan oleh hakim, hakikat bahawa kes tersebut adalah lemah dan berkebarangkalian gagal bukan merupakan alasan untuk membatalkan SP. Mahkamah seharusnya tidak membatalkan tuntutan atau SP berkenaan isu undang-undang yang di dalam proses perkembangan atau evolusi seperti di dalam rayuan ini. Oleh itu, diputuskan bahawa di dalam keadaan ini plaintif-plaintif tidak seharusnya terus dilucutkan peluang untuk menghujah kes mereka (lihat perenggan 21).

(3) Undang-undang substantif yang memberikan bidang kuasa kepada mahkamah-mahkamah kita untuk membenarkan satu penghakiman pengisytiharan boleh didapati dialam s 41 Akta Relief Spesifik 1950 ('Akta'), yang disokong oleh undang-undang prosedur yang terkandung di dalam A 15 k 16 KMT. Menurut A 41 Akta dan A 15 k 16 KMT, bidang kuasa mahkamah untuk membuat penghakiman pengisytiharan adalah tidak terhad dan hanya tertakluk kepada budi bicara sendiri. Oleh itu, mahkamah mempunyai kuasa untuk membenarkan pengisytiharan tanpa mengira sama ada permohonan tersebut mempunyai kausa tindakan atau tidak dan meskipun kausa tindakan tidak wujud pada masa pemfailan permohonan. Oleh itu, mahkamah ini memutuskan untuk mengembalikan SP dan mengemukakannya kepada Mahkamah Tinggi untuk didengar dan diputuskan berdasarkan merit-meritnya di hadapan hakim yang lain (lihat perenggan 26–30).]

Notes

For cases on striking out, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 5463–5473.

Cases referred to

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Brett Andrew Macnamara v Kam Lee Kuan [2008] 2 MLJ 450, HC (refd)

BSN Commercial Bank (M) Bhd v Pentadbir Tanah Daerah, Mersing [1997] 5 MLJ 288, HC (refd)

Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd [2006] 4 MLJ 284, HC (refd)

Dewan Singh v M Thynappa Ltd & Yeo Teck Chiang [1939] MLJ 278 (refd)

Gan Hwa Kian & Anor v Shencourt Sdn Bhd [2007] 4 MLJ 554, HC (refd)

Gobind Singh Deo v Yang DiPertua, Dewan Rakyat & Ors [2010] 2 MLJ 674, HC (not folld)

Guaranty Trust Co of New York v Hannay [1915] 2 KB 536, CA (refd)

Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases [1983] 2 MLJ 227, FC (refd)

Haji Salleh bin Jafaruddin v Datuk Celestine Ujang & Ors [1986] 2 MLJ 412, SC (not folld)

Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge High Court Malaya & Anor [2008] 2 MLJ 11, CA (refd)

Karpal Singh v Sultan of Selangor [1988] 1 MLJ 64 (refd)

Lim Cho Hock v Speaker, Perak State Legislative Assembly [1979] 2 MLJ 85, HC (not folld)

Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener) [1995] 2 MLJ 421, HC (refd)

Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner for Religious Affairs, Terengganu & Ors [1969] 1 MLJ 110 (refd)

Tropical Profile Sdn Bhd v Kerajaan Malaysia, Jabatan Kerja Raya Malaysia & Ors [2007] 8 MLJ 419; [2008] 1 CLJ 513, HC (refd)

YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener) [2009] 4 MLJ 24, FC (not folld)

Legislation referred to

Federal Constitution arts 63, 72
Laws of the Constitution of Perak
Laws of the Constitution of Selangor
Specific Relief Act 1950 s 41
Rules of the High Court 1980 O 15 r 16, O 18 r 19, 19(1), 19(1)(a), (2), (3), O 53

Appeal from: Originating Summons No 21–380 of 2009 (High Court, Shah Alam)

Kamarul Hisham Kamaruddin (MM Athimulan, Lim Kon Keen and Siti Maspuah Maulan with him) (Athimulan & Co) for the appellants.

Tommy Thomas (Nur Ashikin Abdul Rahim with him) (Tommy Thomas) for the respondent.

Low Hop Bing JCA (delivering judgment of the court):

APPEAL

[1] On 21 March 2011, the Shah Alam High Court allowed the respondents' (the defendants') summons in chambers and struck out the appellants' (the plaintiffs') originating summons ('the OS') under O 18 r 19 of the Rules of the High Court 1980. Being dissatisfied, the plaintiffs filed this appeal.

(A reference hereinafter to an Order and a rule is a reference to that order and rule in the Rules of the High Court 1980).

FACTUAL BACKGROUND

[2] The plaintiffs are members of the State Legislative Assembly of Selangor ('SLA').

[3] The first and eighth defendants refer to one and the same person ie Dato' Teng Chang Khim (Dato' Teng) who is the chairman of the SLA Select Committee on Competence, Accountability and Transparency ('SELCAT'), the chairman of the SLA Committee of Rights and Privileges ('CRP') and the speaker of the SLA. Both SELCAT and CRP are committees constituted under the standing orders of SLA ('SO').

[4] The second to seventh defendants are committee members of SELCAT.

[5] The ninth defendant is the clerk of the SLA.

[6] The tenth defendant is the State Government of Selangor.

[7] The plaintiffs' OS sought the following declarations:

(a) that the composition of SELCAT does not reflect the balance between the parties within the SLA as required by SO 72(1);

(b) that in conducting its hearings publicly and in allowing the publication and dissemination of reports concerning its proceedings prior to the presentation of its formal report to the SLA, SELCAT has acted in breach of SO 75 and the Constitution of the State of Selangor 1959 ('the Selangor State Constitution');

(c) Dato' Teng as speaker of the SLA and chairman of CRP is in a position of conflict when he sits as the chairman of SELCAT, and therefore all proceedings conducted by SELCAT are null and void, being contrary to the rules of natural justice;

(d) that the proceedings and functions of SELCAT have impeded upon matters reserved for the public accounts committee of the SLA under the SO and/or the Selangor State Constitution, and SELCAT has thereby acted in excess of its jurisdiction;

(e) that the matters deliberated upon by SELCAT are beyond the scope of the matters expressly referred to SELCAT by the SLA and therefore the said proceedings are null and void, being contrary to SO 73(4); and

(f) that the formation of SELCAT and/or the proceedings thereof are null and void and of no effect whatsoever.

REASONABLE CAUSE OF ACTION UNDER O 18 r 19(1)(a)

[8] At the hearing of the instant appeal, learned counsel from both sides of the Bar table submitted at great length and covered such issues as the privileges of the SLA, and the position in the United Kingdom and Malaysia. They also relied on the privileges of Legislative Assembly and privileges of Parliament respectively under arts 72 and 63 of the Federal Constitution.

[9] More specifically, Mr Tommy Thomas (Ms Nur Ashikin Abdul Rahim with him), of counsel for the defendants, took the position that the OS should be struck out under O 18 r 19(1), as plainly, clearly and obviously the matters complained of do not provide the plaintiffs with a sustainable cause of action recognised by the courts. For this proposition, they cited the following authorities:

(a) *Lim Cho Hock v Speaker, Perak State Legislative Assembly* [1979] 2 MLJ 85 (HC);

(b) *Haji Salleh bin Jafaruddin v Datuk Celestine Ujang & Ors* [1986] 2 MLJ 412 (SC);

(c) *YAB Dato' Dr Zambry bin Abd Kadir & Ors v YB Sivakumar a/l Varatharaju Naidu (Attorney General Malaysia, intervener)* [2009] 4 MLJ 24 (FC); and

(d) *Gobind Singh Deo v Yang DiPertua, Dewan Rakyat & Ors* [2010] 2 MLJ 674 (HC).

[10] Mr Kamarul Hisham Kamaruddin (Mr MM Athimulan, Mr Lim Kon Keen and Ms Siti Maspuah Maulan with him) submitted that the plaintiffs have a reasonable cause of action; and the court must hear and determine the OS on its merits.

[11] In essence, the learned High Court judge has struck out the OS on the

basis of O 18 r 19(1)(a), on the ground that the OS discloses 'no sustainable cause of action' and so it was a 'plain and obvious case for the court to allow the striking out Order'. The relevant portion of the judgment reads as follows:

> 3. As this is an application for a striking out order under O 18 r 19 of the Rules of the High Court 1980, it is my duty to see whether the defendants have shown that the plaintiffs indeed have no sustainable cause of action against them. After reading all the cause papers and scrutinising the parties written submissions as well as listening to their oral submissions, I am satisfied that this is a plain and obvious case for the court to allow the striking out order.

[12] The above submissions and the High Court judgment under this head revolve around the resolution of the following question:

> Does the OS disclose a reasonable cause of action for it to be considered by the court on merits?

[13] The governing procedure is to be found in O 18 r 19(1)(a), pursuant to which the court may at any stage of the proceedings order to be struck out, inter alia, any pleading or the indorsement of any writ in the action, on the ground that it discloses no reasonable cause of action. Order 18 r 19 shall apply to an OS as if it were a pleading: O 18 r 19(3).

[14] Order 18 r 19(2) provides that no evidence shall be admissible on an application under O 18 r 19(1)(a): see eg *Tropical Profile Sdn Bhd v Kerajaan Malaysia, Jabatan Kerja Raya Malaysia & Ors* [2007] 8 MLJ 419; [2008] 1 CLJ 513 (HC); and *Indah Desa Saujana Corp Sdn Bhd & Ors v James Foong Cheng Yuen, Judge High Court Malaya & Anor* [2008] 2 MLJ 11 (CA). In dealing with an application under O 18 r 19(1)(a), the duty of the court is to consider the pleadings in a writ action; or, in the OS herein, the prayers sought by the plaintiffs, and to determine whether the OS is 'obviously unsustainable': see eg *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 (SC).

[15] Now, it is appropriate for us to embark on an analysis of the authorities cited for the defendants.

[16] First, the High Court judgment delivered by Abdoolcader J (later SCJ) in *Lim Cho Hock*, considered two issues viz procedure and jurisdiction. On the issue of procedure, which is relevant to the appeal before us, it was held that a declaration can only be made by OS under the provisions of the (then) O 54A r 1A of the (then) Rules of the High Court 1957 ie 'Any person claiming any legal or equitable right in a case where the determination of the question whether he is entitled to the right depends upon a question of construction of

any written law, may apply by originating summons for the determination of such question of construction, and for a declaration as to the right claimed'. There, the proceedings by OS were incompetent as they did not come within the requirements of O 54A r 1A. In the result, the OS, being misconceived, failed in limine. That being the case, we are unable to see how the defendants could enlist any assistance from the above High Court judgment.

[17] Next, the subject matter in *Haji Salleh bin Jafaruddin*, was an application for judicial review under O 53, seeking an order for prohibition. There was no trace of O 18 r 19(1) being invoked to strike out the notice of motion which was indeed heard on merits.

[18] The third case is *YAB Dato' Dr Zambry*, where an OS sought, inter alia, a declaration under s 41 of the Specific Relief Act 1950 (s 41) and O 15 r 16 that the respondent's decision, in suspending the applicants from attending the Perak State Legislative Assembly, was against the laws of the Constitution of Perak and therefore null and void. Again, the OS was not disposed of under O 18 r 19(1). Instead, it was heard on merits.

[19] The defendants' fourth and final authority was *Gobind Singh Deo*, in which the plaintiff sought declaration to the effect that the plaintiff's suspension as member of Parliament for 12 months was null and void and that he was entitled to his remuneration and allowances. Again, there was no application to strike out the plaintiff's OS under O 18 r 19(1). It was also heard on merits.

[20] Our analysis leads us to the view that the aforesaid four authorities, relied on by the defendants herein, are of no assistance to them. On the contrary, these authorities clearly militate against them, especially the second to the fourth authorities which had been heard and disposed of on merits, and not under O 18 r 19(1)(a).

[21] A proper perusal of the OS would immediately bring into focus the plaintiffs' allegations of the defendants' breaches of the SO, the fundamental rules of natural justice and the Selangor State Constitution. These alleged breaches clearly disclose a reasonable cause of action requiring further ventilation by the parties on merits, pertaining to substantive issues or questions of law of constitutional importance which are in a developing or revolving state. These questions are not unarguable. The determination on such alleged breaches are eminently unsuitable for summary disposal under the striking out procedure. So long as the OS raises some questions fit to be decided by a judge, the mere fact that the case is weak, and not likely to succeed, is no ground for striking out. A court should not strike out a claim or an OS concerning an area of law which is in the process of development or evolution,

as in the instant Appeal. In these circumstances, the plaintiffs should not be summarily deprived of his opportunity to argue their case: see *Malaysian Court Practice 2008*, Vol 1 pp 1553, 1555 and 1556. Our answer to the above question posed in para [12] is in the affirmative.

DECLARATORY JUDGMENT

[22] In the alternative, for the sake of completeness, in response to questions posed by us pertaining to O 15 r 16, the defendants contended that they could still invoke the striking out procedure although the plaintiffs were merely seeking a declaratory judgment by way of declarations under O 15 r.16.

[23] The plaintiffs subscribed to the view that where the OS seeks declarations under s 41 and O 15 r 16, there is no requirement to have a cause of action at all.

[24] Learned counsel for the respective parties herein had not addressed the learned judge on the legal effect of s 41 and O 15 r 16. That being the case, the learned judge cannot be blamed for not expressing any opinion thereon.

[25] The question raised in the aforesaid submissions may be formulated as follows:

> Upon a true construction of s 41 and O 15 r 16, where the OS prays for a declaratory judgment in the form of declarations, is it proper to strike out the OS on the ground that it discloses no reasonable cause of action?

[26] The substantive law that confers jurisdiction on our court to grant a declaratory judgment may be found in s 41 which merits reproduction as follows:

> Discretion of court as to declaration of status or right
>
> 41. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

[27] The above substantive law is supplemented by the procedural law contained in O 15 r 16 which regulates 'declaratory judgment' in the following words:

> 16 Declaratory judgment (O 15 r 16)
>
> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed.

[28] A declaratory judgment merely states the rights or legal position of the parties as they stand without altering them in any way: see *Gan Hwa Kian & Anor v Shencourt Sdn Bhd* [2007] 4 MLJ 554. 'A declaration can be used to ascertain and determine the legal rights of parties or to determine a point of law': *Brett Andrew Macnamara v Kam Lee Kuan* [2008] 2 MLJ 450 at p 459 per Balia Yusof J (now JCA). By virtue of s 41 and O 15 r 16, the court's jurisdiction to make a declaratory order is unlimited, subject only to its own discretion. The court has power to grant a declaration irrespective of whether an application has a cause of action or not and even if a cause of action does not exist at the time of the filing of an application: see eg *Tan Beng Sooi v Penolong Kanan Pendaftar (United Merchant Finance Bhd, intervener)* [1995] 2 MLJ 421; *BSN Commercial Bank (M) Bhd v Pentadbir Tanah Daerah, Mersing* [1997] 5 MLJ 288; and *Cekal Berjasa Sdn Bhd v Tenaga Nasional Bhd* [2006] 4 MLJ 284 at p 294, per Abdul Malik Ishak J (now JCA).

[29] The jurisdiction to make a declaration under the rule is not confined to cases in which the plaintiff has a complete and subsisting cause of action: *Guaranty Trust Co of New York v Hannay* [1915] 2 KB 536 (CA) (Eng); *Dewan Singh v M Thynappa Ltd & Yeo Teck Chiang* [1939] MLJ 278; *Haji Hussin bin Haji Ali & Ors v Datuk Haji Mohamed bin Yaacob & Ors and connected cases* [1983] 2 MLJ 227 (FC); *Karpal Singh v Sultan of Selangor* [1988] 1 MLJ 64; and *Tengku Mariam binte Tengku Sri Wa Raja & Anor v Commissioner for Religious Affairs, Terengganu & Ors* [1969] 1 MLJ 110. Our answer to the question set out in para [25] is in the negative.

CONCLUSION

[30] Based on the foregoing grounds, we allow this appeal, set aside the striking out order of the High Court and substitute it with an order that the OS be reinstated and remitted to the High Court and, with the utmost respect, to

be heard and disposed of on merits before another judge. Parties have agreed that there shall be no order as to costs. Deposit to be refunded to the plaintiffs (the appellants).

Appeal allowed with no order as to costs.

Reported by Kohila Nesan